

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (Text with EEA relevance)

TITLE II

[^{F1}CONVERSIONS, MERGERS AND DIVISIONS OF LIMITED LIABILITY COMPANIES]

CHAPTER III

Divisions of public limited liability companies

Section 1

General provisions

Article 135

General provisions on division operations

1 Where Member States permit the types of companies listed in Annex I coming under their laws to carry out division operations by acquisition as defined in Article 136, they shall make those operations subject to Section 2 of this Chapter.

2 Where Member States permit the types of companies referred to in paragraph 1 to carry out division operations by the formation of new companies as defined in Article 155, they shall make those operations subject to Section 3 of this Chapter.

3 Where Member States permit the types of companies referred to in paragraph 1 to carry out operations, whereby a division by acquisition as defined in Article 136(1) is combined with a division by the formation of one or more new companies as defined in Article 155(1), they shall make those operations subject to Section 2 of this Chapter and Article 156.

4 Article 87(2), (3) and (4) shall apply.

Section 2

Division by acquisition

Article 136

Definition of a ‘division by acquisition’

1 For the purposes of this Chapter, ‘division by acquisition’ shall mean the operation whereby, after being wound up without going into liquidation, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of

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the company being divided of shares in the companies receiving contributions as a result of the division (hereinafter referred to as ‘recipient companies’) and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2 Article 89(2) shall apply.

3 In so far as this Chapter refers to provisions of Chapter I of Title II, the term ‘merging companies’ shall mean ‘the companies involved in a division’, the term ‘company being acquired’ shall mean ‘the company being divided’, the term ‘acquiring company’ shall mean ‘each of the recipient companies’ and the term ‘draft terms of merger’ shall mean ‘draft terms of division’.

Article 137

Draft terms of division

1 The administrative or management bodies of the companies involved in a division shall draw up draft terms of division in writing.

2 Draft terms of division shall specify at least:

- a the type, name and registered office of each of the companies involved in the division;
- b the share exchange ratio and the amount of any cash payment;
- c the terms relating to the allotment of shares in the recipient companies;
- d the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
- e the date from which the transactions of the company being divided shall be treated for accounting purposes as being those of one or other of the recipient companies;
- f the rights conferred by the recipient companies on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
- g any special advantage granted to the experts referred to in Article 142(1) and members of the administrative, management, supervisory or controlling bodies of the companies involved in the division;
- h the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;
- i the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.

3 Where an asset is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, the asset or the consideration therefor shall be allocated to all the recipient companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.

Where a liability is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, each of the recipient companies shall be jointly and severally liable for it. Member States may provide that such joint and several liability be limited to the net assets allocated to each company.

Article 138

Publication of the draft terms of division

Draft terms of division shall be published in the manner prescribed by the laws of each Member State in accordance with Article 16 for each of the companies involved in a division, at least one month before the date of the general meeting which is to decide thereon.

Any of the companies involved in the division shall be exempt from the publication requirement laid down in Article 16 if, for a continuous period beginning at least one month before the date fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes the draft terms of division available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second paragraph, Member States may require that publication be effected via the central electronic platform referred to in Article 16(5). Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on that central electronic platform at least one month before the date fixed for the general meeting. That reference shall include the date of publication of the draft terms of division on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth paragraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.

Article 139

Approval by the general meeting of each company involved in a division

1 A division shall require at least the approval of a general meeting of each company involved in the division. Article 93 shall apply with regard to the majority required for such decisions, their scope and the need for separate votes.

2 Where shares in the recipient companies are allocated to the shareholders of the company being divided otherwise than in proportion to their rights in the capital of that company, Member States may provide that the minority shareholders of that company may

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exercise the right to have their shares purchased. In such case, they shall be entitled to receive consideration corresponding to the value of their shares. In the event of a dispute concerning such consideration, it shall be possible for the consideration to be determined by a court.

Article 140

Derogation from the requirement of approval by the general meeting of a recipient company

The laws of a Member State need not require approval of a division by a general meeting of a recipient company if the following conditions are fulfilled:

- (a) the publication provided for in Article 138 is effected, for each recipient company, at least one month before the date fixed for the general meeting of the company being divided which is to decide on the draft terms of division;
- (b) at least one month before the date specified in point (a), all shareholders of each recipient company are entitled to inspect the documents specified in Article 143(1) at the registered office of that company;
- (c) one or more shareholders of any recipient company holding a minimum percentage of the subscribed capital is entitled to require that a general meeting of such recipient company be called to decide whether to approve the division. Such minimum percentage may not be fixed at more than 5 %. Member States may, however, provide for the exclusion of non-voting shares from this calculation.

For the purposes of point (b) of the first paragraph, Article 143(2), (3) and (4) shall apply.

Article 141

Detailed written report and information on a division

1 The administration or management bodies of each of the companies involved in the division shall draw up a detailed written report explaining the draft terms of division and setting out the legal and economic grounds for them, in particular the share exchange ratio and the criterion determining the allocation of shares.

2 The report shall also describe any special valuation difficulties which have arisen.

Where applicable, it shall disclose the preparation of the report on the consideration other than in cash referred to in Article 70(2) for recipient companies and the register where that report must be lodged.

3 The administrative or management bodies of a company being divided shall inform the general meeting of that company and the administrative or management bodies of the recipient companies so that they can inform their respective general meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of division and the date of the general meeting of the company being divided which is to decide on the draft terms of division.

Article 142

Examination of the draft terms of division by experts

1 One or more experts acting on behalf of each of the companies involved in the division but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of division and draw up a written report to the shareholders. However, the laws of a Member State may provide for the appointment of one or more independent experts for all of the companies involved in a division if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.

2 Article 96(2) and (3) shall apply.

Article 143

Availability of documents for inspection by shareholders

1 All shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date of the general meeting which is to decide on the draft terms of division:

- a the draft terms of division;
- b the annual accounts and annual reports of the companies involved in the division for the preceding three financial years;
- c where applicable, an accounting statement drawn up as at a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;
- d where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 141(1);
- e where applicable, the reports provided for in Article 142.

For the purposes of point (c) of the first subparagraph, an accounting statement shall not be required if the company publishes a half-yearly financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to shareholders in accordance with this paragraph.

2 The accounting statement provided for in point (c) of paragraph 1 shall be drawn up using the same methods and the same layout as the last annual balance sheet.

However, the laws of a Member State may provide that:

- a it shall not be necessary to take a fresh physical inventory;
- b the valuations shown in the last balance sheet shall be altered only to reflect entries in the books of account; the following shall nevertheless be taken into account:
 - (i) interim depreciation and provisions,
 - (ii) material changes in actual value not shown in the books.

3 Every shareholder shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents referred to in paragraph 1.

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Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.

4 A company shall be exempt from the requirement to make the documents referred to in paragraph 1 available at its registered office if, for a continuous period beginning at least one month before the date fixed for the general meeting which is to decide on the draft terms of division and ending not earlier than the conclusion of that meeting, it makes them available on its website. Member States shall not subject that exemption to requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents, and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

Paragraph 3 shall not apply if the website gives shareholders the possibility, throughout the period referred to in the first subparagraph of this paragraph, of downloading and printing the documents referred to in paragraph 1. However, in that case Member States may provide that the company is to make those documents available at its registered office for consultation by the shareholders.

Member States may require companies to maintain the information on their website for a specific period after the general meeting. Member States may determine the consequences of temporary disruption of access to the website caused by technical or other factors.

Article 144

Simplified formalities

1 Neither an examination of the draft terms of division nor an expert report as provided for in Article 142(1) shall be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the division have so agreed.

2 Member States may permit the non-application of Article 141 and points (c) and (d) of Article 143(1) if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the division have so agreed.

Article 145

Protection of employees' rights

Protection of the rights of the employees of each of the companies involved in a division shall be regulated in accordance with Directive 2001/23/EC.

Article 146

Protection of the interests of creditors of companies involved in a division; joint and several liability of the recipient companies

1 The laws of Member States shall provide for an adequate system of protection for the interests of the creditors of the companies involved in a division whose claims antedate publication of the draft terms of division and have not yet fallen due at the time of such publication.

2 For the purpose of paragraph 1, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the company being divided, and that of the company to which the obligation is to be transferred in accordance with the draft terms of division, make such protection necessary, and where those creditors do not already have such safeguards.

Member States shall lay down the conditions for the protection provided for in paragraph 1 and in the first subparagraph of this paragraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the division the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company.

3 In so far as a creditor of the company to which the obligation has been transferred in accordance with the draft terms of division has not obtained satisfaction, the recipient companies shall be jointly and severally liable for that obligation. Member States may limit that liability to the net assets allocated to each of those companies other than the one to which the obligation has been transferred. However, they need not apply this paragraph where the division operation is subject to the supervision of a judicial authority in accordance with Article 157 and a majority in number representing three-quarters in value of the creditors or any class of creditors of the company being divided have agreed to forego such joint and several liability at a meeting held pursuant to point (c) of Article 157(1).

4 Article 99(3) shall apply.

5 Without prejudice to the rules governing the collective exercise of their rights, paragraphs 1 to 4 shall apply to the debenture holders of the companies involved in the division except where the division has been approved by a meeting of the debenture holders, if such a meeting is provided for under national laws, or by the debenture holders individually.

6 Member States may provide that the recipient companies shall be jointly and severally liable for the obligations of the company being divided. In such case they need not apply paragraphs 1 to 5.

7 Where a Member State combines the system of creditor protection set out in paragraphs 1 to 5 with the joint and several liability of the recipient companies as referred to in paragraph 6, it may limit such joint and several liability to the net assets allocated to each of those companies.

Article 147

Protection of holders of securities, other than shares, to which special rights are attached

Holders of securities, other than shares, to which special rights are attached, shall be given rights in the recipient companies against which such securities may be invoked in accordance with the draft terms of division, at least equivalent to the rights they possessed in the company being divided, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased.

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Article 148

Drawing up and certification of documents in due legal form

Where the laws of a Member State do not provide for judicial or administrative preventive supervision of the legality of divisions or where such supervision does not extend to all the legal acts required for a division, Article 102 shall apply.

Article 149

Date on which a division takes effect

The laws of Member States shall determine the date on which a division takes effect.

Article 150

Publication formalities

1 A division shall be published in the manner prescribed by the laws of each Member State in accordance with Article 16 in respect of each of the companies involved in a division.

2 Any recipient company may itself carry out the publication formalities relating to the company being divided.

Article 151

Consequences of a division

1 A division shall have the following consequences *ipso jure* and simultaneously:

- a the transfer, both as between the company being divided and the recipient companies and as regards third parties, to each of the recipient companies of all the assets and liabilities of the company being divided; such transfer shall take effect with the assets and liabilities being divided in accordance with the allocation laid down in the draft terms of division or in Article 137(3);
- b the shareholders of the company being divided become shareholders of one or more of the recipient companies in accordance with the allocation laid down in the draft terms of division;
- c the company being divided ceases to exist.

2 No shares in a recipient company shall be exchanged for shares held in the company being divided either:

- a by that recipient company itself or by a person acting in his own name but on its behalf; or
- b by the company being divided itself or by a person acting in his own name but on its behalf.

3 The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by a company being divided to be effective as against third parties. The recipient company or companies to which such assets, rights or obligations are transferred in accordance with the draft terms of

division or with Article 137(3) may carry out those formalities themselves; however, the laws of Member States may permit a company being divided to continue to carry out those formalities for a limited period which may not, save in exceptional circumstances, be fixed at more than six months from the date on which the division takes effect.

Article 152

Civil liability of members of the administrative or management bodies of a company being divided

The laws of Member States shall at least lay down rules governing the civil liability of members of the administrative or management bodies of a company being divided towards the shareholders of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the division and the civil liability of the experts responsible for drawing up for that company the report provided for in Article 142 in respect of misconduct on the part of those experts in the performance of their duties.

Article 153

Conditions for nullity of a division

1 The laws of Member States may lay down nullity rules for divisions in accordance with the following conditions only:

- a nullity must be ordered in a court judgment;
- b divisions which have taken effect pursuant to Article 149 are declared void only if there has been no judicial or administrative preventive supervision of their legality, or if they have not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under national law;
- c nullification proceedings are not initiated more than six months after the date on which the division becomes effective as against the person alleging nullity or if the situation has been rectified;
- d where it is possible to remedy a defect liable to render a division void, the competent court grants the companies involved a period of time within which to rectify the situation;
- e a judgment declaring a division void is published in the manner prescribed by the laws of each Member State in accordance with Article 16;
- f where the laws of a Member State permit a third party to challenge such a judgment, he does so only within six months of publication of the judgment in the manner prescribed by Chapter III of Title I;
- g a judgment declaring a division void does not of itself affect the validity of obligations owed by or in relation to the recipient companies which arose before the judgment was published and after the date referred to in Article 149;
- h each of the recipient companies is liable for its obligations arising after the date on which the division took effect and before the date on which the decision pronouncing the nullity of the division was published. The company being divided shall also be liable for such obligations; Member States may provide that this liability be limited to the share of net assets transferred to the recipient company on whose account such obligations arose.

2 By way of derogation from point (a) of paragraph 1 of this Article, the laws of a Member State may also provide for the nullity of a division to be ordered by an administrative

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authority if an appeal against such a decision lies to a court. Point (b) and points (d) to (h) of paragraph 1 of this Article shall apply by analogy to the administrative authority. Such nullification proceedings may not be initiated more than six months after the date referred to in Article 149.

3 The foregoing shall not affect the laws of the Member States on the nullity of a division pronounced following any supervision of legality.

Article 154

Exemption from the requirement of approval by the general meeting of the company being divided

Without prejudice to Article 140, Member States shall not require approval of the division by the general meeting of the company being divided if the recipient companies together hold all the shares of the company being divided and all other securities conferring the right to vote at general meetings of the company being divided, and the following conditions are fulfilled:

- (a) each of the companies involved in the operation carries out the publication provided for in Article 138 at least one month before the operation takes effect;
- (b) at least one month before the operation takes effect, all shareholders of companies involved in the operation are entitled to inspect the documents specified in Article 143(1), at their company's registered office;
- (c) where a general meeting of the company being divided, required for the approval of the division, is not summoned, the information provided for in Article 141(3) covers any material change in the asset and liabilities after the date of preparation of the draft terms of division.

For the purposes of point (b) of the first paragraph, Article 143(2), (3) and (4) and Article 144 shall apply.

Section 3

Division by the formation of new companies

Article 155

Definition of a 'division by the formation of new companies'

1 For the purposes of this Chapter, 'division by the formation of new companies' means the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value.

2 Article 90(2) shall apply.

Article 156

Application of rules on divisions by acquisition

1 Articles 137, 138, 139, and 141, Article 142(1) and (2) and Articles 143 to 153 shall apply, without prejudice to Articles 11 and 12, to division by the formation of new companies. For this purpose, the term ‘companies involved in a division’ shall refer to the company being divided and the term ‘recipient companies’ shall refer to each of the new companies.

2 In addition to the information specified in Article 137(2), the draft terms of division shall indicate the form, name and registered office of each of the new companies.

3 The draft terms of division and, if they are contained in a separate document, the memorandum or draft memorandum of association and the articles or draft articles of association of each of the new companies shall be approved at a general meeting of the company being divided.

4 Member States shall not impose the requirements set out in Articles 141 and 142 and in points (c), (d) and (e) of Article 143(1) where the shares in each of the new companies are allocated to the shareholders of the company being divided in proportion to their rights in the capital of that company.

Section 4

Divisions under the supervision of a judicial authority

Article 157

Divisions under the supervision of a judicial authority

1 Member States may apply paragraph 2 where division operations are subject to the supervision of a judicial authority having the power:

- a to call a general meeting of the shareholders of the company being divided in order to decide upon the division;
- b to ensure that the shareholders of each of the companies involved in a division have received or can obtain at least the documents referred to in Article 143 in time to examine them before the date of the general meeting of their company called to decide upon the division. Where a Member State makes use of the option provided for in Article 140, the period shall be long enough for the shareholders of the recipient companies to be able to exercise the rights conferred on them by that Article;
- c to call any meeting of creditors of each of the companies involved in a division in order to decide upon the division;
- d to ensure that the creditors of each of the companies involved in a division have received or can obtain at least the draft terms of division in time to examine them before the date referred to in point (b);
- e to approve the draft terms of division.

2 Where the judicial authority establishes that the conditions referred to in points (b) and (d) of paragraph 1 have been fulfilled and that no prejudice would be caused to shareholders or creditors, it may relieve the companies involved in the division from applying:

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- a Article 138, on condition that the adequate system of protection of the interest of the creditors referred to in Article 146(1) covers all claims regardless of their date;
- b the conditions referred to in points (a) and (b) of Article 140 where a Member State makes use of the option provided for in Article 140;
- c Article 143, as regards the period and the manner prescribed for the inspection of the documents referred to therein.

Section 5

Other operations treated as divisions

Article 158

Divisions with cash payment exceeding 10 %

Where, in the case of one of the operations specified in Article 135, the laws of a Member State permit the cash payment to exceed 10 %, Sections 2, 3 and 4 of this Chapter shall apply.

Article 159

Divisions without the company being divided ceasing to exist

Where the laws of a Member State permit one of the operations specified in Article 135 without the company being divided ceasing to exist, Sections 2, 3 and 4 of this Chapter shall apply, except for point (c) of Article 151(1).

Section 6

Application arrangements

Article 160

Transitional provisions

Member States need not apply Articles 146 and 147 as regards the holders of convertible debentures and other securities convertible into shares if, at the time when the provisions referred to in Article 26(1) or (2) of Directive 82/891/EEC came into force, the position of those holders in the event of a division had previously been determined by the conditions of issue.